Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT FILED APRIL 20, 1977
PROBABLE JURISDICTION NOTED JUNE 13, 1977

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Relevant Docket Entries

IN THE

CIRCUIT COURT OF THE CITY OF NORFOLK

No. M34-76

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

LANDMARK COMMUNICATIONS, INC.,

Defendant.

DATE	PROCEEDINGS
1975	
November 5	Indictment against Landmark
December 10	Motion to dismiss the indictment
December 10	Stipulation of Evidence
December 10	Testimony adduced and proceedings had before the Honorable Alfred W. Whitehurst. Commonwealth's Trial Exhibit C-3 accepted into evidence. Transcript taken.
December 10	Order denying Landmark's motion and taking the matter under advisement
1976	
January 15	Order finding Landmark guilty as charged
January 27	Letter from counsel for the defendant to Judge Whitehurst, noting objections and exceptions of Landmark that should have been made a part of the Final Order
January 27	Notice of Appeal and Assignments of Error

Relevant Docket Entries

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

No. 76-0596

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

DATE	PROCEEDINGS
1977	
March 4	Opinion of the Supreme Court of Virginia.

Indictment Against Landmark, dated November 5, 1975

Misdemeanor

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

November 5, 1975
Date

The Grand Jury charges that: on or about October 4, 1975, in the City of Norfolk, Landmark Communications, Inc., a Virginia Corporation, did unlawfully divulge the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission.

Va. Code Sec. 2.1-37.13, 18.2-12, 18.2-11

Witness: Sgt. L. E. Miller

(√) A True Bill
( ) Not A True Bill

/s/ G. M. Bacon, Jr.
(Foreman of Grand Jury)

[Attestation Omitted in Printing]

Motion to Dismiss the Indictment, filed December 10, 1975

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

Defendant, by counsel, hereby moves this Court to dismiss the indictment against Defendant under Section 2.1-37.13 of the Code of Virginia of 1950, as amended, for unlawfully divulging the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing by the Judicial Inquiry and Review Commission. As grounds therefor, Defendant alleges:

1. Section 2.1-37.13 is a penal statute and as such is construed strictly against the state.

2. The term divulge, as used in Section 2.1-37.13, does not extend to the publication of information concerning an investigation by the Commission after such information has already been made public.

3. Defendant published the identity of said Judge after such information had already been made public.

4. Defendant did not divulge confidential information concerning an investigation by the Commission within the meaning of the term divulge in Section 2.1-37.13.

5. The freedoms under the First Amendment of the Constitution of the United States occupy a preferred position and the State has the burden of proving the constitutionality of legislation abridging such rights.

Motion to Dismiss the Indictment, filed December 10, 1975

6. If the term divulge, as used in Section 2.1-37.13, is held to extend to the publication by Defendant of already public information such Section is unconstitutional in its application to Defendant as it abridges Defendant's First Amendment right of Freedom of the Press.

WHEREFORE, Defendant prays that the indictment be dismissed because the publication of already public information concerning an investigation by the Judicial Inquiry and Review Commission does not violate Section 2.1-37.13, or, in the alternative, that Section 2.1-37.13 is unconstitutional in its application to Defendant as it abridges Defendant's First Amendment right of Freedom of the Press.

Stipulation of Evidence, filed December 10, 1975

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

The Commonwealth and the defendant, by counsel, stipulate the following as evidence in this case:

1. That the defendant is a Virginia corporation which publishes a newspaper, The Virginian-Pilot, from its registered office at 150 West Brambleton Avenue, Norfolk, Virginia.

2. That on or about October 4, 1975, the defendant published its newspaper, The Virginian-Pilot, a copy of which is hereby made a part of the evidence in this case.

3. That prior to the above publication, the Judicial Inquiry and Review Commission had investigated charges and held hearings arising out of the present term of office of a Judge of a Court not of record, who was identified in an article in the above mentioned newspaper published under date of October 4, 1975.

4. That at the time of the publication of the said newspaper and article, the said Judicial Inquiry and Review Commission had not filed a formal complaint with the Supreme Court.

[1]

Transcript of Proceedings held on December 10, 1975

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Printing]

Stenographic transcript of the testimony adduced and proceedings had upon the trial of the above-entitled case in said Court on December 10, 1975, at 10:50 a.m., before the Honorable Alfred W. Whitehurst, Judge.

APPEARANCES:

Mr. Joseph H. Campbell appearing on behalf of the Commonwealth

Messrs. Kaufman, Oberndorfer & Spainhour
By: Mr. Conrad M. Shumadine and Mr. Glenn Hampton appearing on behalf of Landmark Communications, Incorporated

Mr. John O. Wynne appearing on behalf of Landmark Communications, Incorporated.

[Page 2 (Index) Omitted in Printing]

[3] The Clerk: Who is present for Landmark?

Mr. Shumadine: Conrad Shumadine and with me is Mr. Glenn Hampton.

The Clerk: Landmark stands indicted as follows: Virginia, in the Circuit Court of the City of Norfolk on indictment for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission.

The Grand Jury charges that on or about October 4, 1975, in the City of Norfolk, Landmark Communications, Incorporated, a Virginia Corporation, did unlawfully divulge the identification of a Judge of a Court not of Record, which said Judge was the subject of an investigation and hearing before the Judicial Inquiry and Review Commission in violation of Virginia Code Section 2.1-37.13, 18.2-12, and 18.2-11.

Mr. Shumadine: Not guilty, Your Honor.

The Court: All right.

[4] The Clerk: All witnesses who will testify in the case, please stand and raise your hand and be sworn.

(Whereupon all witnesses were duly sworn.)

Mr. Campbell: The Commonwealth waives an opening statement except to say that the evidence by the Commonwealth will come under stipulation.

LANDMARK'S OPENING STATEMENT

The Court: All right.

Mr. Shumadine: May it please the Court, I would like to file a motion to dismiss the indictment which has previously been filed with Mr. Campbell and I think it would be appropriate to argue motions more fully after the Commonwealth has presented its evidence by stipulation.

The Court: All right.

Mr. Shumadine: I would like to make a very brief opening statement just to set down the issues. I am not going to try to argue substantially the law. We can do that after the Commonwealth has its evidence in, but I would like to make a few brief distinctions.

First, we're not talking here today about Landmark's right to get information. This is not [5] an access case.

We are not charged as far as we know with improperly obtaining the information. I believe the evidence will show the information was freely given to a reporter or reporters. Therefore, the question of access of a reporter to otherwise confidential information is not presented.

We are also not dealing with the question in this proceeding as to whether the statute could be unconstitutional if applied to the participants of the Judicial Inquiry and Review Commission. So far as the evidence will show, no one from Landmark Communications was subpoenaed to appear before the Judicial Inquiry and Review Commission and they did not participate.

A different issue is presented as to whether the participants can be bound not to divulge and whether Landmark can be bound not to divulge and we think these are distinctions for the Court to realize in hearing the evidence.

Now, with that in mind, we are going to waive any other opening statement and reserve our argument until the Commonwealth has commented itself.

We have filed a brief. Has the Court received a copy?

The Court: Yes, sir.

[6] Mr. Shumadine: Thank you.

Mr. Campbell: I would like to offer into evidence first the charter and articles of amendment of Landmark Communications, Incorporated, and the last annual report of February 14, 1975, and a stipulated item of evidence which is a copy of the Virginian-Pilot made on October 4th, 1975, the article in question being on page B1.

I'll read to the Court the stipulation of evidence agreed upon by the Commonwealth in defense. "The Commonwealth and the Defendant by counsel, stipulate the following as evidence in this case. One is that the Defendant

is a Virginia corporation published as a newspaper, the Virginian-Pilot from its registered office in Norfolk, Virginia.

Two, that on or about October 4, 1975, the Defendant published the Pilot which is a part of the evidence in this case.

Three—prior to the above publication the Judicial Inquiry and Review Commission had investigated—held hearings on and arising out of the present term of a Court Judge of a Court not of Record, identified in an article in a newspaper on October 4, 1975; that the said newspaper and article said the Judicial Inquiry and Review Commission had [7] not filed a formal complaint with the Supreme Court."

The Court: These will be C-1 through C-4. Is that the Commonwealth's evidence?

Mr. Campbell: That is the evidence of the Commonwealth and we rest.

(Whereupon the aforementioned Charter and Articles of Amendment, newspaper and article were marked as Complainant's Exhibit Number 1 through 4 and received in evidence.)

[Landmark's Argument on the Motion to Dismiss and Strike]

Mr. Shumadine: May it please the Court, Landmark Communications moves that the indictment be dismissed on the ground that it's the burden of the Commonwealth to prove the crime alleged with particularity and with such evidence on the basis that the statute, properly interpreted, does not include newspaper publication.

It's directed solely against the participants at the hearing and does not extend to the publication of newspapers,

followed with the basis that if the statute extends to newspaper publications, the statute is clearly unconstitutional on the First Amendment of the Constitution of the United States and of the Constitution of Virginia.

If is please the Court, I would like to go over the points in some length because I do feel [8] this is a case involving issues of grave public importance. If I may, I think I would like to go over the arguments in the order they have been presented in our brief and I would like to deal with Mr. Campbell's proof after going over the brief.

I would, once again re-emphasizing we're not talking about a participant and not talking about access, much of Mr. Campbell's brief seems to be dealing with access questions and participants. I think the first thing that becomes obvious in looking at the statute is that it nowhere refers to the word "publication." Also, nowhere in the statute is the term "newspaper" mentioned.

If the General Assembly intended to make this statute apply to newpaper publications, it would have written "newspaper publications" right in the statute clearly and unequivocably and they would have known it applied to them and realized this was a prohibition applied against newspapers. It's just not there.

The word Mr. Campbell says applies to newspapers is the word "divulge." We pointed out in the memorandum that the word "divulge" would encompass only the first statement, the first revelation, and it does not go on a never-ending circle to subsequent [9] revelations.

Now, I would like the Court's attention to the definition on page 10 in the memoranda and from Merriam Webster's Third International Dictionary, "To make known; a secret made known which has been previously unknown; which is the first act of the publication."

We have previously pointed out that in the Federal Wiretap Statutes the Courts have been called upon to define the meaning of the word "divulge," that the clear definition is that only the initial party who both intercepted the information and passed it on is subject to punishment under that.

It's plain that "divulge" would only contemplate the original publication. It was only directed at the participants. This argument is further bolstered by the fact that the statute becomes almost absurd if you apply the word to an ever-widening circle. We used an example. What if a participant told his wife? His wife mentioned it to the bridge group. Each of the members of the bridge group mentioned it to their husbands. They mentioned it again. I cannot conceive that the Commonwealth of Virginia intended that every person who passed that information on would be guilty of a criminal [10] sanction. That is not the meaning of the statute. It would not apply to anyone but the participants.

To apply a statute so that it incorporates an ever-widening circle of individuals who don't have any knowledge of their committing a crime is to destroy the rights of the individual. If you take somebody who read the article and told it to his wife before she read it, they would be guilty of a crime because they would continue to divulge it? It's obvious that this statute was not directed to newspapers. It doesn't have the word "newspaper" in it and it wasn't intended to deal with newspapers, but where the participants are concerned, it's designed to prohibit the original evidence. Once the evidence was made public freely, then to publish it—everyone had their rights of speech.

We would emphasize to the Court that as I think we have cited numerous authorities for a thing that if there is any ambiguity, it's construed against the statute. It is at best ambiguous. I would respectfully suggest to the Court that it's rather plain in its meaning. It's only to the original utterance and not an application to any other publication.

The reason the General Assembly did not apply the statute beyond the original utterance was [11] plain—they wanted to avoid the Constitutional question. They didn't want to make it fly in the teeth of the United States Constitution.

Now, moving on from that point, we would like to then move into the constitutional arguments. We would like at the outset to note that what is being dealt with in this case is nothing more than a publication—publication of an article which mentions the Judge's name and which mentions the fact he was under investigation. So far as we know, each of the charges in the article is absolutely 100 percent true and so far as we know, the article was not written in connection with any pending case.

The hearing of the Review Commission had been completed and as far as the evidence will show, it had been completed some time before. So we have here today an attempt to punish a newspaper for publishing the truth some months after an investigation when, as far as the evidence shows today, there was no pending cases to be affected.

Now I would like to begin by noting as we have noted in the brief that the rights of the press and the Free Press portion of the First Amendment—do they not mean that the press has the obligation to criticize? In a speech on November 2nd, 1974, at Yale Law School [12] Convoca-

tion, Mr. Justice Stewart spoke about the press and he pointed out that the free press portion was more than free speech; that if free press meant no more than free speech, it would be no more than a redundancy. But it was a protection for the press and it was a private business and given explicit protection and it was so that it could criticize the other three branches of government.

The Supreme Court has expressed that it's not the press' mere right to criticize, but the press has a solemn duty to bear upon each of the other branches of government, including the judiciary.

Now, we would then go on to note as we noted in the third portion of our brief that in order to restrict the rights of the press, it's necessary for the State to come forward with evidence to show that the statute meets some legitimate and some protected governmental purpose. While we recognize that normally a statute is presumed to be Constitutional, that presumption falls in the face of the First Amendment.

"The Supreme Court—" and we're quoting from page 20, "has noted that there is a preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the [13] First Amendment."

The Supreme Court in *Wilson* v. *Moore*, Federal Supplement 635, 638, 639—"In cases involving state action affecting fundamental rights arising out of the First Amendment, the State has the burden of establishing a compelling state interest in order to justify any infringement."

"In order to justify any infringement—" and the cases go on. And the case in a Virginia Federal Court which is quoted on page 22, *Walker* v. *Dillard*—"Since the legislative act challenged here is allegedly in violation of a First

Amendment guarantee, the presumption is against the validity of the statute."

We would point out that the Commonwealth has failed to produce any evidence to show that the State has a legitimate interest in secrecy in this case. He's speculating there might be some danger. There is no evidence against this Defendant to show there is any legitimately protected government interest. All we have here is a speculative argument in a brief. There is no evidence that the Judge will be influenced or that any pending case will be affected or any danger and certainly not a danger of a constitutional magnitude and we're going [14] to come back to that again and talk about specific cases concerning the judiciary. I'm not going to go through all the pages 22 through 24 because I think the law is so well settled, there's no need to go through them.

In order to establish that the statute is constitutional, not only do they have to show a legitimate interest to speculate, but to have clear and compelling evidence of a legitimate State interest involved, and there is not a shred of evidence in this case to show any State interest is affected or any damage done to anyone. I think it's plain such evidence is not available.

Now, to go on, Your Honor, the Supreme Court has recognized that in order to inhibit the press there must be evidence presented of a clear and present danger which is both imminent and immediate and we have no such evidence here.

I think that the three cases probably most closely related in point are cited on page 26; *Bridges* v. *California* and *Craig* v. *Harney*. Each case involves the attempted punishment of a newspaper for publishing editorials or articles highly critical, even vituperatively

critical, of Judges and the two cases are similar because as the legislature has [15] the right to declare acts prohibited by statute, so the Courts have the obvious right recognized throughout Common Law to punish for contempt if there is any intervention in the fair administration of justice and the contempt right has been given the broadest possible interpretation.

We have three cases which dealt with the issue and in each of the cases, the United States Supreme Court has held in each situation, much more revealing than the cause here before us that a punishment for publication is constitutionally prohibited.

Now, in *Bridges* v. *California* we have a situation where the Petitioner's case rested upon comments, where the newspaper commented upon a conviction involving a pending case before the California Court. There were two different articles which were the basis for the contempt citation. As Your Honor may be aware, Harry Bridges was the president of the International Longshoremen's Association and it was an election case and it was decided and won. The editorials said, "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment [16] to the jute mill." This was concerning a probation hearing and it was printed before the probation hearing came before the Judge.

Now, the articles go on to talk about union gangster activity. They are vituperative and false. Another story was of a telegram sent to the Secretary of Labor by Mr. Bridges which referred to the Judge's decision as quote, outrageous, and not to allow the State Courts to override the union majority. It said enforcement by the California Courts would tie up the entire West Coast and therefore,

pressure of the most onerous and difficult type. It was an extraordinary attempt to influence a Judge.

In spite of a finding by the California Court of a grave danger, the Supreme Court reversed holding that the telegrams were not so severe a danger as to create a danger of a constitutional magnitude and I would like to read from some of the portions of that case because I think that case sets the groundwork for the modern law.

First of all the standard was articulated that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless [17] they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

The test as articulated in *Bridges* v. *California* set forth in the brief is that the substantive evil must be extremely serious and the danger must be high. The evil itself must be substantial and the Court goes on to say that it's plain that the unqualified protection in the First Amendment should be given the widest possible effect consistent with an ordered society.

It went on to point out that we assume they're capable of withstanding criticism and even though it's vituperative and not basically accurate, there was no indication that the Judge would be influenced and no danger to the administration of justice and the Court then said, "To regard it therefore as a substantial influence upon the course of justice would be to impute to Judges a lack of firmness, wisdom or honor, which we cannot accept as a major premise." And the Court overruled the lower Court.

Justice Frankfurter dissented in that case, but the basis for his dissent was that there was a [18] pending case

and there was a threat in a pending case before the Court at that time and Justice Frankfurter has stated many times his view that the only basis for any restriction upon the press is if there is a pending case—actively pending—and there is an attempt to influence the result of that decision. Justice Frankfurter was the Justice most concerned about the extent of the danger and who wanted to justify a greater restriction on the rights of the press than did the majority.

The next case is the case of *Pennekamp* v. *Florida* and we speak for a unanimous Supreme Court. In that case were the editors and publishers of a newspaper. The contempt was based on two editorials and a cartoon. The cartoon accompanying one editorial caricatured the Court by a robed figure as a Judge tossing aside formal charges to hand a document marked "Defendant Dismissed" to a powerful figure at his left arm, intentionally drawn to show a criminal type. To the right of the bench a futile individual labeled "Public Interest" vainly protesting, was shown.

The criticism was unfair. The Supreme Court recognized it was not a balanced report and many important details were dismissed of the [19] caricaturing cartoon as obviously vituperative.

You have a gangster figure by the side of the Judge and as far as a motion for a rehearing, the article was directed as influencing the Court's decision and printing what the Court regarded as threats. The language was vituperative, but a unanimous Supreme Court ruled that this was not constitutional, protected the press, and once again I'm quoting from the *Pennekamp* v. *Florida,* again reiterating the evil "must be extremely serious and the

degree of serious imminence high before the utterance can be punished."

The Court did note and I will refer the Court to 328 U.S. at 344 where Court noted, "It is clear that the full truth in regard to the quashing of the indictments was not published." So, here we have a protection of something that was not accurate. The full truth was not published and that was to be distinguished from the instant case where the full truth was published.

"Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." And they went on, even looking at that cartoon aimed at a specific Judge and a specific [20] situation and said, "We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all other doors behind it."

I think the difference in those cases is almost extraordinary. We then go to *Craig* v. *Harney* and that was a case where a lay Judge was sitting in Texas and the Jury and the lay Judge disagreed over the verdict to be rendered in the case. The Judge locked the Jury in the Courthouse or in the vicinity overnight and forced a verdict and forced the Jury to finally render a verdict against a serviceman.

The newspaper came out on a pending case while still before the Court on a motion for a rehearing criticizing the lay Judge again in vituperative language, indicating that the decision was wrong. The lower Court made findings of fact using the Bridges case as a test and said that yes, there was a clear and present danger to the administration of justice and yes, the Judge could be influenced

in his decision. In spite of those clearly defined findings of fact, the United States [21] overruled the decision and held that the report was constitutionally protected and again reiterated the language.

Once again they also noted that although the language was vituperative, it was directed at a sitting Judge in a pending case and not of the immediacy to have a constitutional restraint and did that even though it was false. I think the danger from false reports on the judicial process are immensely greater than the true reports. That hardly requires comment and these cases still remain in the law. They have not been overruled.

There are two other decisions we find to be particularly persuasive that the Supreme Court ruled on. It's a case of *Garrison* v. *Louisiana*. You might recall Garrison was a District Attorney in Louisiana who obtained some measure of fame during the Kennedy assassination when he indicated that the could prove a conspiracy. He accused the eight Judges in Louisiana of everything from laziness, inefficiency, to racketeer influence. Those charges were false and there was not even a reasonable basis for believing the charges. The case went to the United States Supreme Court and the United States Supreme Court overruled the [22] decision of the lower Court, holding that the charges were constitutionally protected and they did this in a civil libel claim and obviously there is more restriction of the freedom of speech in a case involving the majesty of criminal law, more so than a civil filing.

I would also call the Court's attention to the case of *United States* v. *Wood* which is cited *Wood* v. *Georgia* in our brief. A county sheriff accused the Judge involved in a case of race agitation and compared the investigating activities to the activities of the Ku Klux Klan. He was

charged with contempt and that in and of itself presented clear and imminent danger to the proper administration of justice in Superior Court.

In spite of that, the United States Supreme Court reversed. It said, "The type of danger evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political truth."

It would seem that a simple comparison with [23] the facts in these cases with the instant case would show the type of restraint asked. In each of those except for *Garrison* v. *Louisiana* there was a pending case before the Court. In this case we're not dealing with a pending motion. In each of those there was an element of falseness, recklessness, certainly of vituperation, even an element of a threat in the Bridges case. It would certainly influence a Judge.

Here there is no falseness, no vituperation, no element of a threat. The difference is remarkable; and the difference in language, I don't think it's a difference in degree. The mere fact that someone is investigated in a democracy where we have to presuppose that the people know the difference between an investigation and guilt can't even be compared to the statement made by Garrison or the newspapers in *Pennekamp* v. *Florida* or *Bridges* v. *California*. This is not a difference in degree. It's a fundamental gulf. It's a simple case of constitutional protection.

I would like to also point out this is the most extraordinary statute if it applies to newspapers, which of course we do not believe it does, because it has no time limit.

Much was made [24] of the fact that the restriction in Bridges would have been of a short duration because anything could be said after the trial was ended and much was made of the right they had to punish for contempt because the trial was going on and the interference of that trial was very serious. Here there is no end to the restraint. The restraint goes on forever unless the Judicial Inquiry and Review Commission certifies to the Supreme Court of Virginia. So, if the Review Commission refuses to certify, we have an open-ended restraint on the right of the people to speak and the right of the newspaper to publish and it goes on to the statute of limitations.

I don't know of any case in the United States that has ever upheld such an all-encompassing restriction. I think this indicates one of the reasons why the statute should be interpreted so as to avoid this open-ended problem. I would also like to add that so far as we can determine there really are only three arguments that could be raised to show a clear and present danger and even though the State hasn't put on any evidence and failed completely in their burden of proof, we would like to deal with their arguments. They are rationally unsound.

[25] First would be that the Virginia Judges may be influenced in regard to pending cases. Well, that would assume that the Virginia judiciary was so weak willed and spineless so as to not have the character of the Florida and Texas judiciary to possess. We have a laudable tradition of Judges of character and integrity. They have made unpopular decisions in the past and will continue to make unpopular decisions in the future and there isn't any evidence that the Commonwealth can obtain that publication is going to have any influence on Judges and particularly Virginia Judges.

If anything, the law is much stronger in Virginia. The reason the Commonwealth didn't introduce evidence is because there is no evidence. Virginia Judges will continue to make hard decisions when they're called upon and there is no basis to anything different.

The Court: You say Virginia Judges would be influenced? What do you mean—other Judges or do you mean the Judge hearing that case?

Mr. Shumadine: We decided what we would do was to think of one reason that the Commonwealth could raise and we thought that they would say Virginia Judges would be influenced by the threat [26] of revelation of their names—that they couldn't function.

The Court: Judges in general—would it make them timid and in fear because their name was revealed?

Mr. Shumadine: They have got to prove it and they can't prove it. And the reason they can't is because, frankly, Virginia Judges are not going to be influenced by that situation and that is particularly true because Virginia Judges are at present subject to—or they're not subject to criticism because they don't deserve the criticism, but the newspaper has a right to criticize Judges and use vituperative language and they are protected in their rights in cases like *Garrison* v. *Louisiana*.

The Virginia judicial system hasn't demanded that the articles be written, but even if the articles were written and even if there were serious articles critical of Judges, there is no reason to believe that the Virginia judiciary would not have the same fortitude or, I suspect, a much greater fortitude than California or Texas and Florida, where the Supreme Court held that since the Judges were men of integrity and fortitude, they wouldn't be influenced and they wouldn't be influenced much [27] worse by anything here.

The second charge, if they were going to speculate and I think they have chosen speculation that maybe the Review Commisson couldn't operate unless it could maintain secrecy. The article was written after the hearing and once again we can presume that the men on that Commission are men of integrity and they're not going to be influenced by publicity. The question of whether that preference can be maintained in regard to the participants is not here and that is another case entirely. But even the preference cannot, and this comes from I believe, the Bridges case. Even the expression of alleged preference cannot be allowed to trample on the First Amendment rights. Even if it were preferable to hold the meeting in secret, it's not reasonable that the Commission could not function well even if it had to operate in public and whether it has to operate in public is not before us.

What is before us is publication after the event had become public—after the participants had made it known. It was the participants who divulged the information.

The third argument, I guess, that could be made would be that there would be some lack of [28] confidence in the judiciary as a whole because of the publication of a few isolated charges. As the United States Supreme Court has recognized in the Bridges case, I think the reverse is much more likely to be true. I think the danger of secrecy is not so much in what the government keeps secret, but in what the public believes the government keeps secret. I don't believe Mr. Campbell can make the argument that the condition of Judges in Virginia would be so deplorable that it's necessary to keep any charges made against them in secret so they could officially operate. There hasn't been any evidence to that fact and can't be. The far greater danger would be to say there is a legitimate reason for

having secrecy than the speculation carried by the secrecies. As the Court recognized in Bridges, it would be a graver danger to the effective functioning of the Judges and the effectual operation of the judicial process than any publicity and certainly, furthermore, when you compare—and we go back to the five cases we cited—when you compare the type of statements made in those five cases; a gangster sitting beside the bench, a threat of a strike on the West Coast—with the mild statement made here, and the Supreme Court held unanimously [29] in the Pennencamp case that that evidence was not enough and there was a finding of fact in the lower Court which they overruled, saying it was clear there was no constitutionality,—that the evidence did not amount to a constitutional degree.

Here we have an article after the fact with no pending case, no vituperation and a true article. If you can't publish falseness, it's surprising that we can't publish the truth in Virgina. I don't believe the constitutional cases to allow that distinction to be made.

In summary, we think that from the lack of evidence before us, number one there is no public danger. There certainly has been no evidence of any public danger, much less evidence of a clear and compelling present public danger of an imminent kind. Number two, we would like to point out there is no indication anywhere that the Judges in Virginia will be influenced; no danger of any breakdown of justice and no danger to any governmental interest.

Finally, we would like to argue and argue specifically that it's abundantly plain that the statute and the use of the word "divulge," applies solely to the participants, that it was the first [30] utterance that was intended to con-

stitute a crime by the legislature. The statute is clear, but even if it's not clear, under the well-established rules of statutory construction we will recognize in Virginia that any ambiguity should be strictly construed against the Commonwealth and in favor of the accused and Landmark is guilty of no crime because of publication of this article once it became public. It was not a crime and this statute doesn't mean to have every individual who repeats a rumor indicted for a crime and we would urge the Court to reject it.

Mr. Campbell: I'll not go through the brief. You did get a copy of my brief?

The Court: I have both briefs and I haven't really totally digested them.

COMMONWEALTH'S ARGUMENT ON THE MOTION TO DISMISS AND TO STRIKE

Mr. Campbell: I would like to point out first something that is not in Mr. Shumadine's brief and he didn't argue it and it could be easily overlooked, but I think it's very important that this is not just a statute that we're dealing with. We are dealing with the Constitution of Virginia. Article 6, Section 10 of the Constitution of Virginia or what we call the New Constitution, says that the General Assembly shall create a Judicial Review Commission consisting of members of [31] the judiciary, the bar, and the public and vested with the power to investigate charges which would be the power for retirement or censure or removal of a Judge. The Commission shall be authorized to conduct hearings and subpoena witnesses and documents. Proceedings before the Commission shall be confidential. It says, "shall be confidential." Then it goes on to say that if the Commission find the charges to be well-founded, may

file a formal complaint with the Supreme Court. At the end of the section it states that the General Assembly may also provide in the same manner for removal of any Judge of a Court not of record.

Well, now the General Assembly were mandated to set up this Judicial Review and Inquiry Board and that is what they did, but before we get to that we must go back to the Constitution of Virginia on the freedom of speech and the press and there are some words that I think should be particularly noted. It does give freedom of speech and press and states they are among the great bulwarks of liberty. Nobody can deny that, but it also says therein, "being responsible for the abuse of that right."

So here you have two provisions of the [32] Constitution of Virginia. The Court has certainly got to recognize they're both there because they are there. Code Section 2.1-37.13—the provisions we're talking about talks about the proceedings in the papers, including the identification of the subject Judge, shall be confidential and shall not be divulged by anyone except the Commission. You have got "confidential" and "not be divulged by anyone except the Commission." It's not saying any member of the Commission either. It says "the Commission" and it goes on to say that the charges are well founded and filed with the Supreme Court. It loses its confidentiality and what Mr. Shumadine has argued and he and I have both agreed that we have not found a case strictly in point—a recorded case which would possibly clear up some of these things. There is a similar type of law and possibly very parallel in California and noted in my brief that it has been discussed, but insofar as we know, no judicial decision on it. Mr. Shumadine has argued here about things, as far as I'm concerned, are irrelevant to the question to be decided

by the Court. The Commonwealth is not saying that the newspapers cannot criticize a Judge. That is completely a separate argument. Of course they can [33] criticize a Judge. Sometimes they might be held in contempt, but we recognize the right of anybody to criticize a Judge or any public official. It's done all the time.

What we're talking about here is the constitutional mandate of the State of Virginia and a law which sets up a procedure not only to investigate well-founded charges against a Judge, but to protect that Judge from charges that are not well founded.

Now, if the newspaper wanted to file a formal complaint against the Judge, the mechanics would be to go through the Review Commission. Once they did that, they become subject to this law, but if they wanted to criticize the Judge in an editorial or even in a newspaper article, there's no law says they can't unless they would come within some contempt provision.

Now, this issue was raised—the constitutionality of this statute, and I apologize to the Court that I don't have the Supreme Court of Virginia's records to put before them, but yesterday afternoon it hit me that this provision had been used in a case in Richmond. The attorney, who is Jeroid (phonics) Green—he's the fellow who, I think he sued Senator Willey over Senator Willey's writing [34] a letter to the College of William and Mary or something. Anyway, I believe he filed a complaint and made it known and he was charged with this section. He was convicted and he appealed it. I say I'm arguing this because I talked to the Commonwealth's Attorney in Richmond yesterday and he told me this. He said the First Amendment issues were raised in that case before the Supreme Court of Virginia and in 215 Virginia on page LXII you will find "Writs

of Error Refused, Jeroid (phonics) X. Green, Circuit Court of the City of Richmond, Supersedeas refused, dated April 14, 1975."

That is the case Mr. Davis, Commonwealth's Attorney in Richmond, gave me as being the case that he's talking about. Now, we know without having to look up cases that when the Supreme Court takes up a constitutional question, it takes up all constitutional questions, but he assured me that the First Amendment constitutional question had been raised by Mr. Green and that it was obviously considered by the Supreme Court and error was denied and therefore all constitutional questions have been decided by the Supreme Court of Virginia. I think too that Mr. Shumadine, if this were a different type of case, would have a good argument [35] when he talks about a clear and present or imminent danger, but that is not necessarily what we're talking about here.

Instead of a newspaper, say, criticizing a Judge which they could do and which I assume the Judge could answer back if he so desired, although I notice it's not the custom of Judges to reply to criticism of that nature, it's a very different thing to publish and the public are the ones that come before the Courts. When you read the article—I've lost it—which does identify the Judge and I'm using this not to state that I agree with the facts contained in here other than the name of the Judge because that has been evidence. And by the way, Mr. Shumadine said we didn't present any evidence which, of course, is not the case. We have stipulated the evidence and it's before the Court, but to show you the reasons for this type of law and why it does pose a danger and I'll cite you some other laws that have nothing to do with the danger apparently stemming from charges of incompetence, indicating either that the

five-man panel found insufficient cause for action or that the case is still under review. "A number of local lawyers have confirmed privately, sources said. Most sources [36] indicate general incompetence was the issue in question. Although no one disclosed the specific charges, another source said—". And then to heighten the focus of the whole thing, in the first column, the print—and it's a misdemeanor to reveal Commission actions. In the second column they say, "All Review Board procedures are to be confidential unless the charges are held to be well founded. In that case a formal complaint can be filed with the Supreme Court and held in open Court."

You go back to relying on your sources and newspapers must rely on their sources and can't identify them. Otherwise they would lose them. It's no different from police informers or informers on criminal charges, but what does it do to the Judge whose picture and name, which is the identification, are in the article? What do we know? I have not stipulated to any truth in the article and no—contrary to the brief of the Defendant, but what do we know of the truth of any of this outside of the fact that someone has ascertained there had been a charge and a hearing? The rest of it—the identification and the rest of it so far as we know could be fiction because that is always possible when sources—"a number of local lawyers said—" are [37] used.

I would like to point out at this time I'm not stipulating to any facts related in Mr. Shumadine's brief and he has stated many facts in his brief which are not in evidence and I would ask the Court to ignore them or strike them from the brief because they are not evidence. There is a footnote on page 2 which says it's not an editorial and no position is stated. "He did no more than report the news."

Well, I don't know what an editorial is or a position is, but when they use words like "apparently incompetent" and "sources indicate competence was the issue", I don't know whether that is editorializing or not, but we're not talking about facts so that's the type of thing that I would ask the Court not to consider when considering his brief.

On page 4, he says, "Several of the participants at the hearing revealed to a reporter from Landmark that the fact of the investigation and the name of the Judge—". There is no evidence of that. You have the news article there, but we did not stipulate as to that truth contained in the article. We stipulated to the fact that that is the newspaper and that is the article.

[38] On page 5 here is a reference to Mr. Dunn and I don't say that is not so at all, that he made the decision and what he thought, but it's at this point not evidence, I would like to point out.

On page 6 he says, "So far as this record will show, the information may have been commonly known within the Norfolk legal community or perhaps even beyond the legal community and into the community at large." Pure speculation. If he's going to speculate and we're going to decide the case on speculation, the Commonwealth will have the right to speculate.

For instance, what effect it would have on this particular Judge if there was absolutely nothing to the charges as finally found by the Commission—and we don't know. I myself can state this to the Court: I do not know what the charges were against that Judge and I have asked and I have asked people who do know and they say, "I cannot tell you."

On page 9 he says, "The information was, of course, made public when it was given to the reporter or re-

porters." We don't even know it was given to a reporter. There's no evidence to that. Now, as to his definition as to "divulge," saying [39] that once it's divulged, then that's the end of it. That is a complete misconstruction of the word "divulge" as I understand it. I use a different dictionary from him, I notice.

He used Webster's Third International and I've got Webster's Second College Edition. "To make public, disclose, reveal, make known." So there is a different interpretation or a different definition for that word—"to make public." But the only information this case has before it today is the fact that Landmark Communications is the first to have made this public and unless the Court by speculation can believe what is stated in the article, that's all the evidence.

Now, down through the brief that Mr. Shumadine has presented, there are other items I would construe as being evidence assumed by him and I would ask, but I won't go into it, and ask the Court to consider only the evidence it has before it.

Mr. Shumadine quoted a while ago from Mr. Justice Stuart?

Mr. Shumadine: Yes.

Mr. Campbell: Justice Stuart's article was in the Media Handbook in which Mr. Shumadine [40] had a part in preparing and did a fine job, but Justice Louis [sic] F. Powell was also quoted in that Media Handbook, "Free press, fair trial," and so forth and I think the Court might be interested—I think it's on the last page of his presentation.

I'll just read this. "As an additional safeguard within the Bill of Rights we must avoid being confused by generalizations and slogans. There has been a disposition

sometimes to equate the news media and the public. Again, some persons have talked about a public right to know as if it were a constitutional right. It is not a constitutional right, but that is the theory on which the newspapers oftentimes—not always—but oftentimes operate. These generalizations miss the point.

The essence of freedom guaranteed with the First Amendment is to permit the unlimited expression of views about matters of public and political concern and to respect the sanctity of individual conscience and belief. We have recognized there are areas of privacy in which respect for the individual and his rights preclude the satisfaction of public curiosity." I think that last part boils down to exactly what we're talking about here, too.

[41] Now, getting into other areas that are to me analogous to this type of thing, even going to public records, look at the Juvenile Court System. Unless the Judge says so in particular cases, they're not going to publish the names of juveniles because the law says they can't.

Another statute which to my knowledge has really not been attacked, so I don't want to mislead the Court, but 53.3-22 says, "No newspaper shall print the details of the execution of criminals—only that he was executed shall be printed or publicized." Now, where is that clear and present danger to anything if they want to sensationalize an execution like used to be done, especially I think in some New York newspapers where they described in graphic details the last twitch of the body and that sort of thing?

Well, the legislature has decided that as a matter of public policy that is getting into more, even the degree, and they passed this law and it has stopped in Virginia.

Another area that Mr. Shumadine might want to address himself to and the Courts haven't gone into this, but it's

not included in either brief, but it's been upheld in many, many cases and it's [42] referred to and a copy is attached to my brief and that is the fa??? charges brought against lawyers themselves and not talking about the judiciary. We are talking about lawyers. Anybody can bring charges against an attorney before the District Committee of the Virginia State Bar. These meetings are not publicized.

In his Media Handbook, which Mr. Shumadine helped on --maybe he didn't have anything to do with that part, but it states in there how these hearings are conducted and they are conducted in secrecy. That type of law has been upheld throughout the United States. Again there is a particular reason for it; protection of persons from unfounded charges. You put it in the newspaper and whether it says, "Lawyer denies charge of incompetence," or whatever it might be, what does the public see? He's been charged with something—that is all. The fact he denied it doesn't mean anything. It's the same purpose of a statute like this.

Well, I think the rest of what I've been speaking about is taken care of in the brief and I know Mr. Shumadine's brief is much longer than mine is, but I really don't think that his hits the points we're talking about and if the Court will take [43] into consideration the fact we do have a Constitution in Virginia—that is the main thing that the General Assembly had to follow and did so in a way that cannot be ambiguous. Those words they use in there are common to everybody, but anybody—any lawyer can twist a meaning out of them that he wants to.

Landmark's Rebuttal

Mr. Shumadine: I would like to begin by noting a significant statement made by Mr. Campbell. First of all,

Mr. Campbell points out in looking at the different dictionaries and he seems to be admitting very plainly there might be two different meanings of the word. We think it has one meaning and deals only with the original utterance and he's admitting another meaning can be applicable.

If the Court will recognize the well-recognized rule of criminal construction, that will dispose of the case. If there were two possible interpretations, then the Defendant receives the benefit and the Defendant should be dismissed. He should not be convicted of a crime where there are two possible meanings.

Second, he referred to a statute which is most significant and that is the one about the executions. First of all he does admit it's never been challenged and I know why. Few newspapers [44] have the poor taste to want to challenge that law, even though it may be unconstitutional. When the legislature intended to refer to newspapers, they didn't say, "No person shall divulge." They said "no newspaper," and they name the newspaper and they said exactly what the newspaper shouldn't do. They didn't try to go behind and around in order to make their purpose clear. They made it definitely clear and when he compared that statute with the one before the Court today, I think it becomes abundantly clear that statute doesn't apply to newspapers.

The Assembly knows how to make a statute apply to a newspaper. The Constitution of Virginia does say that the Commission shall be confidential, but the writers, some of the more skillful ones in Virginia, did not mention newspapers and they never said publication. They directed their remarks directly to the Commission. That constitutional Commission knew exactly how to say the newspaper shall not publish it.

You have to give serious effect to what I regard not as an oversight, but as a clear expression of intent. It's not

a crime to violate the confidentiality? The express language of the statute makes it a crime and we have to examine the [45] statute very strictly in criminal law. It says, "Any person who shall divulge information in violation of this provision shall be guilty of a misdemeanor." The word is "divulge," not losing the confidentiality which is a crime and I think it's most significant Mr. Campbell does not say that the example used in our defense today is unreasonable. Apparently he's going to punish the bridge group and we'll have an ever-widening set of concentric circles which may eventually encompass all the citizens of Norfolk.

There is nothing in the statute history that indicates that our legislature intended to apply the statute in this extraordinary fashion which would not only be trampling on the rights of the press, but on the rights of people to speak. No time limit—no speech ever about this particular Judge. We don't admit there is no case. There has never been a case filed against a newspaper and I think the reason there has never been a case filed against a newspaper is plain. No one thought this type of statute applied to newspapers. I know we never thought it applied to newspapers and we try to keep up with statutes that might have to do with rights of the press.

I think it's clear that this type of statute is prohibitive. The newspaper has a right [46] to print news. It's one of the most serious inhibitions that can possibly be enacted. I am interested that Mr. Campbell notes the case *United States* v. *New York Times* which we refer to as the Pentagon Papers Case. That was confidential paper and allegations were made by the government that there would be serious consequences to the publication. The New York Times standard in regard to a prior restraint

says "Unless there is an imminent danger to the national defense of the United States, no prior restraint can be permitted."

It's a case cited by Mr. Campbell. It's probably the most extraordinarily hard-hitting case on a constitutional restraint that can be found. When we talk about clear and present danger, it's the lowest First Amendment test. In a prior-restraint case, only the actual threat of the security of the United States can prevent a publication. We are talking about clear and present danger because that is the lowest standard ever applied and it's not met in this case and it's a test that Mr. Campbell has the burden of proof. He hasn't submitted any proof.

Now, I would like to deal with the case of Mr. Green and point out he was a participant and [47] his case is entirely different from the case here before us. If the Supreme Court considered the constitutional issues, I doubt they ever considered them from the standpoint of a newspaper which wasn't involved and we wouldn't consider that the newspaper was involved in that case. The refusal to grant a writ is hardly an acceptance—it wasn't in the Supreme Court and it's entirely different. The Green case involving a participant is not the case that Your Honor has before you today. Now, I would like to point out Mr. Campbell seems to be arguing—making an interesting argument to reverse the burden of proof. It seems to me he has the burden of proof beyond a reasonable doubt on each and every element necessary to his case. I believe it's necessary that he establish that the material was confidential. There has been no evidence that it was confidential.

We certainly don't have to show that the material was not confidential. It's his burden of proof. This is a crim-

inal case, not a civil case. He's got to prove beyond a reasonable doubt that it was confidential. He's got to prove we were the, if I'm correct and I believe I am, that this statute applies only to the original utterance, and that we were the first utterance.

[48] He has introduced the news article and it makes it plain we got the information from sources. He's put it in himself. It's abundantly plain. He's put it on himself that we were not before the Commissioner. Mr. Campbell makes a very important point. Had we brought a charge, then we would have been subject to the law or the Commission. Now, I may be slightly misquoting him, but that was pretty clearly the indication he made. Since we didn't bring the charge, we never came under the confidentiality jurisdiction of the Commission. We never got that far—that the statute never dealt with Landmark or the Virginian-Pilot or the reporters.

Just as I don't believe the statute would apply to you or your wife if she heard the rumor and repeated it. I don't believe she would be guilty of a crime unless she was before the Commission. That was not intended.

We don't have the burden of proof in a criminal case. He's got to show confidentiality and original utterance and clear and present danger and facts. He can't come up and speculate. The government can always speculate and say there will be a reason a citizen will lose his liberty. Each of the cases that we've discussed talking about utterances [49] in Pennencamp, Craig, Wood and Bridges, evidence was presented why that would influence the Judge and the effect it would have and particularly in the last case there were substantial findings in fact that it did influence the Judge. The Court overruled, saying this isn't enough.

Now, once again I would like to point out he has quoted Justice Powell on a right-to-know case. Mr. Stewart made it plain that the Constitution was neither a freedom of information act. It doesn't open doors so long as the meeting remains confidential and someone doesn't reveal the information outside of the Commission and tell it to a reporter. It remains confidential, but once the door has been opened by a participant and he has made it public by telling it to a reporter or his wife, then the information becomes very widely known and it's public for all purposes. That is a most important distinction, that even if it's permissible to be confidential and that's not before us, but let's assume it's permissible—this confidentiality can be enforced and this statute can withstand scrutiny and the participants are under penalty of crime of what went on in the Commission room. Even if that is so, it would be an extraordinary break with [50] our liberties to have one of the participants to walk out of the room in front of 300 people and yell out, "Judge Blank is being investigated." Once he's done that, every one is still prohibited from speaking, writing, from talking, would be so fundamental a break with our liberties, I think it should cause us grave pause.

I think that is the initial divulgence which the legislature considered and I think we can give great faith in our legislators because they didn't intend it to be applied to newspapers and using the type of language Mr. Campbell has used and the other cases that we've talked about that have not been challenged—they also involve an extraordinarily different range of subjects—private individuals.

The plain fact is that a Judge is one of the most important officials in a democracy, that he is subject to criticism and there is a right to write news about the Review Commission.

It's hypothetical, but let's assume that some people got on the Commission and didn't do their job—that the five members of the Commission decided they weren't going to function. They weren't going to ever certify anyone and while we almost never have a problem with corruption in Virginia, hardening [51] of the arteries is a similar affliction. Let's assume some of the Judges are unable to function or are stricken with strokes. If this is constitutional and the Commission refuses to certify, you can never write about that. You can never say the Review Commission isn't functioning? They won't certify?

Now that is a most important area of public interest. That is a type of prior restraint that I think would be unheard of in this country. I think it's so far reaching as to almost defy thought to think we would say this Commission alone, of all agencies of government is not subject to criticism, is not subject to review, that the public and press' mouths are forever sewn shut on the matter of criminal law.

The cases cited by Mr. Campbell is imminent danger to the government. It's not an imminent threat to the destruction of government.

Now I believe we have covered each of the points cited by Mr. Campbell and once again I emphasize the fact that I think the easy way to dispose of this case is to—Mr. Campbell has admitted the word "divulge" has two meanings. It has an everyday meaning and that is only to the initial utterance. The General Assembly knows how [52] to make it apply to newspapers and this doesn't. I think there is no evidence of clear and present danger. Mr. Campbell has utterly failed in meeting his clear burden of proof and as a matter of law there is no clear and present danger in the light of this article in comparison

to the cases I've cited. The charges are so mild there can be no danger and if the statute applies in that respect, then we move to strike the Commonwealth's evidence to hold that Landmark is guilty of no crime whatever.

The Court: You gentlemen have certainly presented and hit the issues very clearly. Normally I like to dispose of a case as soon as I hear it, but I think this does demand for me to take more time. I have read your briefs, but to study them and I would like to read some of these cases in full and it just seems to follow—you went into a great deal of detail and I think to do proper justice to this issue, I'm going to study these cases in full. I want to read the cases themselves you've cited and study the issue and I want to make a disposition later—not a long time from now, but relatively soon. I don't know if it would be convenient for you gentlemen to fix a date.

Mr. Campbell: Right now it's on a Motion [53] to Strike and Mr. Shumadine—I don't whether he wants—

Mr. Shumadine: I'll put on Mr. Dunn if you're going to overrule.

The Court: The bigger issues are the ones I've got to wrestle with. The immediate ones about the indictment I'm going to overrule. The ultimate decision—the constitutional question—the criminal interpretation, the language—that is the one I'm going to have to wrestle with. Like I say, you gentlemen, if it's convenient for you to fix a date within twenty days or so or something of that nature—

Mr. Shumadine: If you would overrule the motion I think I will put on Mr. Dunn because we do want to have a little bit of information for the record.

The Court: All right.

Mr. Shumadine: Mr. John Dunn, please.

[54] [TESTIMONY OF JOSEPH W. DUNN, JR.]

JOSEPH W. DUNN, called as a witness on behalf of the Defendant, after having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Shumadine:

Q. Would you state your name and address for the record? A. Joseph W. Dunn, Jr., 216 84th Street, Virginia Beach, Virgina.

Q. What is your position, Mr. Dunn? A. I'm Managing Editor of the Virginian-Pilot.

Q. What are the duties of the Editor? A. Basically the duties of the Managing Editor are to oversee both administratively and in day-to-day operations the functions of the News Room of the Virginian-Pilot and its employees.

Q. Who decides whether to run an article in the paper? A. A normal article may be decided by any number of editors. If there is a question about a specific article, that article is brought to me for a decision.

[55] Q. Are you familiar with the article which is involved in this suit? A. Yes, I am.

Q. Who decided to run that article? A. I did.

Q. Why did you make that decision, Mr. Dunn? A. I made the decision to run that story on the basis that I felt it was a very important story—important because it involved an individual who is intently involved in the judicial process, who obviously had been under investigation in terms of a serious nature.

A complaint had been filed many months prior to the hearing that was conducted in Scope and that I felt it was a matter that should be brought to the attention of the people.

Q. Were you aware of the existence of a Virginia statute that involved the Commission? A. At the time I made the decision I was not aware of the existence of the Virginia statute which is in question today. I was aware there was a misdemeanor penalty in terms of the divulgence of information or the revealing of information on the part of people that participated and that was my understanding and my judgment.

Q. Did you feel that the statute applied to newspapers? [56] A. No, I did not.

Q. Why was that? A. I have in the 13 years I've been associated with the Virginian-Pilot been schooled by you and by many others in the legal profession in terms of prior restraint, libel, First Amendment rights and it was inconceivable and never crossed my mind to be frank, that a statute in the Commonwealth of Virginia or any other state would be so written to prohibit a newspaper from publishing information of that importance. It was inconceivable to me.

Q. Were any of the reporters or employees or agents of Landmark subpoenaed before the Commission? A. No, they were not.

Q. When did you begin to hear about the story, Mr. Dunn? A. My first knowledge of the story came on Friday afternoon, which I believe was October 3rd, the day prior to publication. It came to me on the basis of written information which is turned in daily by the various editors to me indicating what we plan to write for the following day's paper, so I heard initially myself of the story about 4:00 or 4:30 the day before publication.

Mr. Shumadine: We have no further questions.

Transcript of Proceedings held on December 10, 1975

[57] *Cross Examination by Mr. Campbell:*

Q. You did not consult legal counsel before this? A. I did not consult legal counsel.

Q. And as far as your judgment is concerned on what the law is, the fact is there are, for instance, libel suits pending against the newspaper, are there not? A. That's correct.

Q. And the fact is that since you have been with the newspaper some libel suits have been sustained against the newspaper? A. Not against my newspaper to my knowledge, Mr. Campbell.

Q. Landmark Communications? A. Not to my knowledge. You refer to libel suits if I understand you correctly.

Q. Yes. A. Not to my knowledge.

Q. Did you read the statute before you made your decision? A. No, I did not. As a matter of fact I was not apprised of the specific citation in the Virginia Code Book.

[58] Mr. Campbell: That's all, thank you.

The Witness: You're quite welcome.

(Witness excused).

The Court: I'm going to do this—take this under advisement and I suppose rather than fixing a date now relatively soon, 15 or 20 days from now, we'll set it down and make the disposition.

Mr. Campbell: I can set it now if Mr. Shumadine has his dates.

The Court: Whatever is convenient for you.

Mr. Shumadine: It might be that the Court, after reading the briefs, will ask for further authority

Transcript of Proceedings held on December 10, 1975

from counsel and we are here to be of aid to the Court in whatever the Court wants.

The Court: If you have anything that you think will shed light, please give it to me, because I wish to study it. Once again, as I say, in 15 or 20 days I can let you gentlemen go and you can fix a date.

Mr. Shumadine: That will be fine, Your Honor.

[Certificate of Court Reporter Omitted in Printing]

Commonwealth's Trial Exhibit C-3

(copy of the news article of October 4, 1975 published in The Virginian-Pilot)

(See Opposite) ☞

Possible Discipline

Hearing Held About Judge

By STEVE GOLDBERG

Virginian-Pilot Staff Writer

NORFOLK — A formal hearing concerning possible disciplinary action against Juvenile and Domestic Relations Court Judge H. Warrington (Spike) Sharp was held early last month.

The two-day hearing at Holiday Inn-Scope, conducted by members of the state Judicial Inquiry and Review Commission, apparently stemmed from charges of incompetence against the 55-year-old judge.

No formal complaint has been filed by the commission against Sharp, indicating either that the five-man panel found insufficient cause for action or that the case is still under review.

No commission member would say which is the case.

The review board is the state's most serious mechanism for policing judicial conduct. Its decision to press a formal complaint to the State Supreme Court could lead to retirement, censure, or removal from office.

Hearings and subsequent deliberation are conducted in strict secrecy since it is a misdemeanor to reveal commission actions.

Nevertheless, a number of local lawyers have confirmed privately since the first week of September that the hearing did take place. It is the first such investigation held here since the board was created in 1973, several said.

Sharp himself replied, "No comment" to a series of questions about the procedure.

Reno S. Harp III, deputy attorney general, headed the prosecution, sources said. Lawyer William L. Ward defended Sharp. The session stretched to two days. Otherwise, few details are known.

Most sources indicate general competence was the issue in question, although no one disclosed the specific charges. "It was more a melange of general complaints," said a lawyer subpoenaed to appear at the hearing.



Judge Sharp

Another source said that complaints from both citizens and lawyers were aired.

A typical response came from one assistant Commonwealth's attorney, identified as a witness at the hearing. "I can't even acknowledge that I know what you're talking about," he said. "And don't you dare tell anyone I've even talked to you."

All review board procedures are to be confidential unless charges (reviewed at a hearing) are held to be well-founded. If that happens, a formal complaint may be filed with the State Supreme Court and a hearing conducted in open court.

There are five commission members: Thomas L. Phillips of Lynchburg and Fred Bateman of Newport News, both lawyers; Judges Franklin Backus of Alexandria and Ernest W. Ballou of Roanoke; and Dr. George M. Modlin, retired chancellor of the University of Richmond. Modlin is chairman.

According to Harp, the commission has brought a recommendation to the State Supreme Court only once. That came in the case of Radford Circuit Court Judge Southall Jordan, who was subsequently censured for representing his son in General District Court on two separate traffic charges.

(See Hearing, Page B4)

Hearing on Judge

Continued from Page B1

No commission member would confirm that action has been completed, or is still pending in the Sharp case. (The group's next regular meeting is scheduled for Oct. 17.)

Anyone — lawyer, fellow judge, or individual citizen — can lodge a complaint with the Inquiry and Review Commission. Conduct or mental and physical competence may be questioned. One lawyer noted that the board was originally viewed by many legislators as a mechanism for replacing judges who had become senile or otherwise impaired.

Commission member Bateman said that if a judge is determined to be disabled, he may retire with full benefits. If he is removed for incompetence, retirement and other benefits are lost.

Once a complaint is filed, an investigator (commission staff includes one lawyer and one non-lawyer) or a commission member is sent to explore the charge.

A Norfolk lawyer said he was visited in late June or early July by a special investigative officer "who asked a lot of questions (about Sharp)."

The man was later called as a witness.

If evidence is deemed sufficient, a formal hearing such as the one in Norfolk is held. According to Bateman, the commission holds hearings about 15 to 20 days each year. Perhaps half a dozen of those are considered formal.

When asked why only one case had ever been referred to the Supreme Court, Bateman said, "Several (judges) did resign . . . A number have retired or something like that."

Sharp, a Norfolk County native, became an associate judge in Juvenile and Domestic Relations Court in 1960, succeeding Alfred W. Whitehurst.

He was reappointed to six-year terms in 1967 and 1973, following unanimous votes of the Circuit Court judges.

Under judicial reform legislation passed in 1973, the procedure for selecting lower court judges was altered. The General Assembly assumed responsibility for their election.

Judges were given the option of continuing their term or going before the legislature for reappointment. Most judges, including Sharp, chose the latter route.

No complaints were logged against him during legislative hearings conducted then, one local legislator said. Sharp's present term will expire in January 1990.

Order of the Circuit Court of the City of Norfolk dated December 10, 1975, denying Landmark's motions and taking the matter under advisement

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 10th day of December, in the year 1975.

[Caption and names of attorneys omitted in printing]

Landmark Communications, Inc., a Virginia Corporation, who stands indicted for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, this day appeared in Court by its representative, Glen Hampton, and came as well the Attorney for the Commonwealth and the Attorney for the Accused, as aforesaid, and thereupon the accused, by counsel, moved the Court to quash the aforesaid indictment, which said motion being argued by counsel and fully heard by the Court, is overruled, to which action of the Court in overruling the said motion, the accused, by counsel, duly excepted. Thereupon on arraignment, the accused, by counsel, entered a plea of Not Guilty to the said indictment, waived trial by jury, and the whole matter of law and fact was heard and determined by the Court. Having heard the evidence introduced on behalf of the Commonwealth, thereupon, the accused, by counsel, moved the Court to strike the Commonwealth's evidence, which said motion having been argued by counsel, and fully heard by the Court, is overruled, to which action of the Court in overruling said motion, the accused, by counsel, duly excepted. Having heard all the evidence and testimony, and argument of counsel, and having received exhibits in the

Order of the Circuit Court of the City of Norfolk dated December 10, 1975, denying Landmark's motions and taking the matter under advisement

case, the Court doth take the matter of finding under advisement, and doth order that this case be continued on the docket of this Court.

/s/ ALFRED W. WHITEHURST
Judge

Order of the Circuit Court of the City of Norfolk dated January 15, 1976 Finding Landmark Guilty as Charged

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 15th day of January, in the year 1976.

[Caption and names of attorneys omitted in printing]

This day again came Landmark Communications, Inc., a Virginia Corporation, who stands indicted for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, in the person of its representative, Glen Hampton, and came as well the Attorney of the Commonwealth in the person of Joseph H. Campbell and the Attorney for the Accused in the person of Conrad M. Shumadine, pursuant to continuance order entered on the 10th day of December 1975; and it appearing to the Court that the accused was tried on the 10th day of December 1975 on a misdemeanor indictment for Divulging Identification of Judge Subject of Investigation and Hearing of Judicial Inquiry and Review Commission, and the matter of a finding having been taken under advisement, and now being fully heard and determined by the Court; the Court doth find the defendant Guilty as charged in the said misdemeanor indictment and doth fix punishment at a fine in the sum of five hundred dollars ($500.00) and that the defendant be required to pay the costs of prosecution.

/s/ ALFRED W. WHITEHURST
Judge

Letter from Conrad M. Shumadine to the Honorable Alfred W. Whitehurst dated January 27, 1976, noting Landmark's objections and exceptions

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Letterhead of Kaufman, Oberndorfer and Spainhour]

January 27, 1976

The Honorable Alfred W. Whitehurst
Judge of the Circuit Court
City of Norfolk
Norfolk, Virginia

Re: Commonwealth of Virginia v.
Landmark Communications, Inc.
(M-34-76)

Dear Judge Whitehurst:

You will recall that I telephoned you today to discuss the fact that inadvertently the objections and exceptions of Landmark had not been made a part of the Final Order. I advised you that I had discussed the matter with Mr. Campbell, and he agreed that exceptions and objections were duly made and noted, and you suggested that I write you to advise you of the language which should be included. We would ask that the following be included.

> The defendant, by counsel, renewed its Motion to Strike the Commonwealth's evidence on the grounds that it was insufficient, and this Motion was overruled, and defendant, by counsel, duly objected and excepted. Defendant, by counsel, duly objected and excepted to

Letter from Conrad M. Shumadine to the Honorable Alfred W. Whitehurst dated January 27, 1976, noting Landmark's objections and exceptions

the action of the Court in finding the defendant guilty on the grounds that the statute does not apply to newspaper publication, that insufficient evidence was introduced to support a conviction, that if the statute applies to newspaper publication, it is unconstitutional and on the other grounds more specifically set forth in the memoranda and arguments of counsel.

I also note that the Order refers to Mr. Glenn Hampton as Landmark's representative. Mr. Hampton is an associate with our firm. Landmark's representative was Mr. John O. Wynne, its corporate secretary.

I am, of course, sending a copy of this letter to Mr. Campbell.

I appreciate the Court's courtesy. If there are any questions, we would be delighted to discuss the matter with you.

Respectfully yours,

KAUFMAN, OBERNDORFER and SPAINHOUR

/s/ CONRAD M. SHUMADINE

CMS:bb

CC: Joseph H. Campbell, Esquire

Notice of Appeal and Assignments of Error, filed January 27, 1976 with the Clerk of the Circuit Court of the City of Norfolk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

[Caption Omitted in Priting]

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

To: Clerk of the Circuit Court
of the City of Norfolk

NOTICE OF APPEAL

Pursuant to the Rules of the Supreme Court of Virginia, Defendant, Landmark Communications, Inc. ("Landmark"), will file a Petition for Appeal in the Supreme Court of Virginia and requests that you prepare and transmit the record on appeal to the Supreme Court of Virginia. A transcript of the proceedings will be filed.

ASSIGNMENTS OF ERROR

The trial court erred in:

(A) Refusing to grant Landmark's Motion to Dismiss, Motion to Strike the Commonwealth's Evidence and Motion for a Directed Verdict;

(B) Holding that Section 2.1-37.13, Code of Virginia (1950), as amended, extends to the publication of information which has already been made public;

(C) Not holding Section 2.1-37.13, Code of Virginia (1950), as amended, unconstitutional on its face because it violates the First Amendment right of freedom of press;

BEST COPY AVAILABLE

Notice of Appeal and Assignments of Error, filed January 27, 1976 with the Clerk of the Circuit Court of the City of Norfolk

(D) Not holding Section 2.1-37.13, Code of Virginia, (1950), as amended, unconstitutional as it is applied to Landmark because it abridges Landmark's First Amendment right of freedom of press; and

(E) Finding Landmark guilty of a violation of Section 2.1-37.13, Code of Virginia, (1950), as amended, because, as a matter of law, the evidence is insufficient to support this conviction.

[Certificate of Service Omitted in Printing]

Opinion of the Supreme Court of Virginia, dated March 4, 1977 (also set forth at 1a of Jurisdictional Statement)

IN THE SUPREME COURT OF VIRGINIA

Record No. 760596

Present: All the Justices

LANDMARK COMMUNICATIONS, INC.

v.

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HARRY L. CARRICO
Richmond, Virginia, March 4, 1977

FROM THE CIRCUIT COURT OF THE CITY OF NORFOLK
Alfred W. Whitehurst, Judge

The principal question in this case involves a confrontation between the First Amendment guaranty of freedom of the press and a Virginia statute which imposes criminal sanctions for breach of the confidentiality of proceedings before the Judicial Inquiry and Review Commission. A preliminary question is whether the appellant-newspaper is subject to the proscription of the statute.

Creation of the Judicial Inquiry and Review Commission was mandated by Article VI, Section 10 of the 1971 Constitution of Virginia for the purpose of investigating charges concerning disabled and unfit judges. The constitutional provision specifies that "[p]roceedings before the Commission shall be confidential."

The Commission was actually created by the General Assembly in 1971, at its session held to implement the new constitution. (1971 Va. Acts Spec. Sess. ch. 154; Va. Code §§ 2.1-37.1 *et seq.*) In the act creating the Commission, its powers and duties are outlined with detail. By the terms of Va. Code § 2.1-37.4, the Commission is empowered to investigate charges "which would be the basis for retirement, censure, or removal of a judge under § 10 of Article VI of the Constitution." If the Commission finds the charges well-founded and sufficient to constitute the basis for retirement, censure, or removal of a judge, it shall file a formal complaint with this court.[1]

Virginia Code § 2.1-37.13[2] provides in pertinent part that "[a]ll papers filed with and proceedings before the Com-

[1] Under Article VI, Section 10 of the Constitution, if this court finds the judge disabled to perform his duties, it shall retire him; if it finds he has engaged in misconduct while in office, it shall censure or remove him.

[2] "*§ 2.1-37.13. Confidentiality of papers and proceedings.*—

All papers filed with and proceedings before the Commission, and under the two preceding sections (§§ 2.1-37.11, 2.1-37.12), including the identification of the subject judge as well as all testimony and other evidence and any transcript thereof made by a reporter, shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character. However, if the Commission shall find cause to believe that any witness under oath has willfully and intentionally testified falsely, the Commission may direct the chairman or one of its members to report such finding and the details leading thereto including any transcript thereof to the Commonwealth's attorney of the city or county where such act occurred for such disposition as to a charge of perjury as the Commonwealth may be advised. In any subsequent prosecution for perjury based thereon, the proceedings before the Commission relevant thereto shall lose their confidential character.

All records of proceedings before the Commission which are not filed with the Supreme Court in connection with a formal complaint filed with that tribunal, shall be kept in the confidential files of the Commission.

Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor."

mission . . . including the identification of the subject judge . . . shall be confidential and shall not be divulged by any person to anyone except the Commission, except that the record of any proceeding filed with the Supreme Court shall lose its confidential character." The Code section provides further that "[a]ny person who shall divulge information in violation . . . of this section shall be guilty of a misdemeanor."

The appellant, Landmark Communications, Inc., publishes *The Virginian-Pilot*, a newspaper of general circulation in the Tidewater area of Virginia. On October 4, 1975, the newspaper published an article stating that the Commission had conducted a "formal hearing concerning possible disciplinary action against" a judge, identified by name, of a court not of record in the City of Norfolk. The article recited further that the hearing "apparently stemmed from charges of incompetence against the . . . judge."

On November 5, 1975, Landmark was indicted for unlawfully divulging the identity of a judge who was "the subject of an investigation and hearing by the Judicial Inquiry and Review Commission." Upon trial of the indictment by the court without a jury, it was stipulated that Landmark had published the article in question; that the Commission had investigated charges and conducted hearings concerning the judge named in the article; and that, at the time of the publication, the Commission had

not filed a complaint with this court respecting the judge.[3] Landmark was convicted of the charge laid in the indictment, and it was fined the sum of $500.00.

On appeal, Landmark contends that it is unclear from a reading of Va. Code § 2.1-37.13 whether the statute's proscription against divulging information concerning a Commission proceeding applies not only to the participants in such a proceeding but also to a newspaper which publishes information obtained from one of the participants. Because the statute is penal in nature, Landmark argues, it must be strictly construed, and any doubt or ambiguity concerning its application must be resolved against the Commonwealth and in favor of one accused of its violation.

When the doubt or ambiguity in § 2.1-47.13 is so resolved, Landmark asserts, the statute should be construed to mean that a violation may occur only upon "the *first act of disclosure* . . . by an indivudual who had *actually participated* in some manner in the proceedings of [the] Commission." Under this construction and the circumstances of this case, Landmark concludes, the information concerning the judge in question "lost its confidentiality" and "became public upon its first disclosure" by a participant in the proceedings, and all Landmark did was to publish information "which was *voluntarily and freely* given to it."[4]

While we agree with Landmark that the statute must be construed strictly, we disagree with the remainder of

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[3] As of the date of this opinion, no complaint has been filed with this court concerning the judge in question.

[4] The record is silent, however, concerning the manner in which Landmark secured the information.

its argument. We hold that Va. Code § 2.1-37.13 does not suffer the doubt or ambiguity asserted by Landmark.

In unmistakable terms, the statute states that all information concerning a proceeding before the Commission, including the identity of the judge who is the subject of the inquiry, shall be confidential and that this confidentiality shall continue until a formal complaint against the judge is filed with this court. So far as is pertinent here, only upon the filing of such a complaint is the record of a proceeding before the Commission placed in the public domain; only then does information concerning a proceeding before the Commission lose its confidential character.

Until a complaint is filed with this court, the proscription of the statute is applicable to punish any *person* who *divulges* any information concerning a proceeding before the Commission. Although Landmark is a corporation, by the force of Va. Code § 1-13.19,[5] it is a "person" within the meaning of Va. Code § 2.1-37.13. To "divulge" information means to disclose it or to make it known. *Black's Law Dictionary* 567 (4th ed. 1951). When Landmark published its article, it disclosed or made known to the public at large information which still was confidential.

The proscription of Va. Code § 2.1-37.13 is so clear that it would be unreasonable to construe the statute, as Landmark interprets it, to mean that only the participants in a Commission proceeding are subject to the prescribed sanctions or that only the first disclosure of confidential information is actionable. Clearly, Landmark's actions

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[5] "*§ 1-13.19. Person.*—The word 'person' may extend and be applied to bodies politic and corporate as well as individuals."

violated Va. Code §2.1-37.13 and rendered it liable to imposition of the sanctions prescribed by the statute.

But, Landmark contends, to impose upon it the sanctions prescribed by Va. Code § 2.1-37.13 would unconstitutionally abridge its First Amendment guaranty of freedom of the press. This contention poses the serious question in the the case and presents an issue not decided previously by this court or, so far as our research discloses, by any other appellate court in this country. The importance of the question is emphasized when it is considered that 34 jurisdictions in addition to Virginia, by constitutional provision, statute, or rule, require confidentiality of proceedings before bodies similar to our Judicial Inquiry and Review Commission.[6]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press." Clearly, "the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Nebraska Press Ass'n* v. *Stuart*, —— U.S. ——, 49 L.Ed. 2d 683, 696 (1976). Freedom of the press, however, is not an absolute right, and the state may punish its abuse. *Near* v. *Minnesota*, 283 U.S. 697, 708 (1931). But when and under what circumstances a state may punish such an abuse is the difficult question, given the uncertainty

[6] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, and Wyoming. American Judicature Society, *Judicial Disability and Removal Commission, Courts and Procedures* (1973).

created by the numerous decisions interpreting First Amendment rights.

From a review of the decisions of the United States Supreme Court involving restrictions upon First Amendment freedom of the press, it appears that the cases fall into three general categories: (1) denial of right of access to information; (2) prior restraint upon publication; and (3) subsequent punishment for publication. The present case involves no denial of access; Landmark concedes that it has no greater constitutional right of access than the general public to information concerning Commission proceedings. *See Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974).

While conceding that it is "difficult to determine whether the instant case is a 'prior restraint' or 'subsequent punishment' case," Landmark contends that Va. Code § 2.1-37.13 does impose a prior restraint upon publication. Prior restraints, Landmark asserts, bear a heavy presumption against their constitutional validity, *New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971), and are permissible only (1) to protect the national security, (2) to prevent the publication of obscenity, and (3) to prohibit expression associated with situations which tend to incite acts of violence and the overthrow by force of government. *Near* v. *Minnesota*, 283 U.S. at 716. Because the publication in the present case does not fall within one of these exceptions, Landmark concludes, the prior restraint imposed by Va. Code § 2.1-37.13 is constitutionally impermissible.

We are of opinion, however, that Va. Code § 2.1-37.13 does not impose a prior restraint upon publication. Gen-

erally, prior restraints take the form of injunctions, requirements for licenses or permits, or censorship or previous review. Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation,* 51 Notre Dame Lawyer 898 (1975-1976). A prior restraint "has an immediate and irreversible sanction." *Nebraska Press Ass'n* v. *Stuart,* —— U.S. at ——, 49 L.Ed.2d at 697-98. By contrast, Va. Code § 2.1-37.13 seeks to preserve the confidentiality of Commission proceedings by providing for the imposition of criminal sanctions *after* the statute has been violated. Thus, Virginia's proscription fits properly within the "subsequent punishment" category of cases.

The distinction between "prior restraint" and "subsequent puninshment" is based upon "a theory deeply etched in our law," *viz.,* that " a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). Accordingly, the "presumption against prior restraints is heavier—and the degree of protection broader —than that against limits on expression imposed by criminal penalties." *Id.* at 558-59.

But even though this may be a "subsequent punishment" case and not subject to the heavy presumption against invalidity, Landmark argues, it does not follow that publication of the article in question is punishable by the Commonwealth. In "subsequent punishment" cases, Landmark asserts, the Supreme Court's decisions require that before a state may punish a violation of a restriction upon expression, it must satisfy the "clear and present danger" test. This test, opines Landmark, requires the state to

prove by "actual facts" that the expression it seeks to prohibit would result in an evil which is substantial and imminent, posing a clear and present danger to a legitimate governmental interest.

The governmental interest involved here, Landmark says, is the orderly administration of justice; the burden was upon the Commonwealth, therefore, to prove by "actual facts" that publication of the article in question created a clear and present danger to the administration of justice in Virginia. Because the Commonwealth failed to produce "actual facts" showing a clear and present danger, Landmark concludes, the judgment imposing the sanction upon it is invalid under Supreme Court decisions interpreting the First Amendment.

Upon examination of the Supreme Court's decisions, we find that the "clear and present danger" standard was enunciated in *Schenck* v. *United States,* 249 U.S. 47 (1919). *Schenck* involved defendants charged with circulating printed matter alleged to constitute a violation of the Espionage Act of June 15, 1917. In defense, the First Amendment freedoms of speech and press were asserted. In the course of its opinion upholding the convictions, the Court stated:

> "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is

done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force . . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 249 U.S. at 51-52.

Subsequently, in a series of decisions, the Supreme Court applied the "clear and present danger" test to cases involving publications allegedly perilous to the orderly administration of justice. In *Bridges* v. *California*, 314 U.S. 252 (1941), *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), *Craig* v. *Harney*, 331 U.S. 367 (1947), and *Wood* v. *Georgia*, 370 U.S. 375 (1962), the Court reversed convictions for contempt based upon out-of-court comment concerning pending cases. In each instance, the Court held that the particular expression involved was insufficient to pose a clear and present danger to the orderly administration of justice and, therefore, was protected by the First Amendment.

Bridges defined the scope of the "clear and present danger" standard. There, the Court stated:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can

> be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment . . . does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." 314 U.S. at 263.

It is upon *Bridges*, *Pennekamp*, *Craig*, and *Wood* that Landmark relies to support its assertion that before a state may punish expression, it must prove by "actual facts" the existence of a clear and present danger to the orderly administration of justice. *Bridges*, however, does not mention any requirement of evidence to establish a clear and present danger. But in *Craig*, the Court analyzed *Bridges* to have held that:

> "[T]he compulsion of the First Amendment, made applicable to the States by the Fourteenth . . . forbade the punishment by contempt for comment on pending cases in absence of *a showing* that the utterances created a 'clear and present danger' to the administration of justice." 331 U.S. at 372 (emphasis added).

And, in *Pennekamp*, the Court stated:

> "For circumstances to create a clear and present danger to judicial administration, *a solidity of the evidence* should be required . . . ." 328 U.S. at 347 (emphasis added).

Finally, in *Wood*, after criticizing the trial court for "simply [adopting] as conclusions of law the allegations made in the contempt citation," 370 U.S. at 387, the Court stated:

> "Hence, in the absence of *some other showing* of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to silence the petitioner, his utterances are entitled to be protected." 370 U.S. at 389 (emphasis added).

We agree with Landmark that there is no evidence in the record favorable to the Commonwealth's position beyond the stipulated facts showing Landmark had published the article in question, the Commission had investigated charges and conducted hearings concerning the judge named in the article, and, at the time of the publication, the Commission had not filed a complaint with this court respecting the judge. And we agree that Landmark cannot be punished for publishing the confidential information contained in the article unless the revelation created a clear and present danger to a legitimate state interest—the orderly administration of justice. But we do not agree with Landmark that, because the Commonwealth did not produce other evidence by way of "actual facts" to show a clear and present danger, *Bridges*, *Pennekamp*, *Craig*, and *Wood* require reversal of the judgment of the trial court.

In our opinion, the present case differs substantially from *Bridges*, *Pennekamp*, *Craig*, and *Wood*. Those decisions involved the *common law power* of a court to punish allegedly contemptous out-of-court statements concerning

pending cases. Necessarily, therefore, the imposition of sanctions in such circumstances was based, as the Court noted in *Bridges*, upon a "'concept of the most general and undefined nature.'" 314 U.S. at 260. Because the common law power of contempt is so general and undefined, the Court was concerned that, without evidence of a clear and present danger, fair public comment and criticism concerning a judge and the conduct of his judicial affairs would be "effectively discouraged." *Bridges*, 314 U.S. at 269.

By contrast, in the present case, the power of a Virginia court to punish out-of-court statements of the type published by Landmark is fixed by statute, Va. Code § 2.1-37.13, and the substantive offense for which the punishment may be imposed is clear and well-defined. The restraint upon expression imposed by the statute is limited, and it is related solely to the purpose sought to be served by the legislation: the preservation of the confidentiality of Commission proceedings. The statute does not seek to discourage any comment or criticism concerning a judge or the conduct of his judicial affairs save the disclosure of information resulting from a breach of the confidentiality of Commission proceedings.

Virginia Code § 2.1-37.13 represents a legislative declaration by the General Assembly, fortified by a plain statement of public intent expressed in the Virginia Constitution, that a clear and present danger to the orderly administration of justice would be created by divulgence of the confidential proceedings of the Commission. We believe this legislative declaration elevates the restriction upon speech and press involved in this case to a level of legal dignity not enjoyed by the contempt judgments in-

volved in *Bridges, Pennekamp, Craig,* and *Wood.* Indeed, in *Wood,* which involved a Georgia contempt proceeding, the Supreme Court stated:

> "Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary . . . and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements . . . . This holding thus deprives the judgment of coming to this Court 'encased in the armor wrought by prior legislative deliberation' . . . ." 370 U.S. at 385-86.

And, in *Bridges,* which involved a California contempt proceeding, the Supreme Court said:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations . . . .' [H]ere the legislature of California has not appraised a particular kind of situation and found a specific danger . . . sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question,' that the specified publications

> involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.'" 314 U.S. at 260-61.

As we have noted, the imposition of punishment upon Landmark in this case does not depend upon some undefined concept of judicial authority. Instead, the sanction imposed springs from a clear and well-defined legislative declaration that breach of the confidentiality of Commission proceedings is so contrary to the public interest[7] that it constitutes a substantive evil of immediate and serious peril to the orderly administration of justice and, therefore, should be punishable. Accordingly, we believe the judgment imposing the sanction in this case is fortified against Landmark's constitutional attack because it is "encased in the armor wrought by prior legislative deliberation," and it is strengthened further by the requirement of the Virginia Constitution that proceedings before the Commission "shall be confidential."

We must note, however, that in the *Bridges* opinion the Supreme Court did observe: "even the expression of 'legislative preferences or beliefs' cannot transform minor

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[7] *Cf. Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), a case involving a civil action for breach of privacy. The Supreme Court held that the First Amendment protected the revelation in a television broadcast of the name of a rape victim, although the disclosure was violative of a Georgia statute which made it a misdemeanor to publish or broadcast the name. The news reporter, however, had obtained the victim's name from the indictment in the criminal case, which was a public record made available to the reporter for his inspection. The Court stated:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." 420 U.S. at 495.

matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression." 314 U.S. at 263. But we believe the matters which, in the first place, prompted creation of the Judicial Inquiry and Review Commission, dictated the requirement of the Virginia Constitution that proceedings of the Commission "shall be confidential," and necessitated the enactment of the sanctions prescribed by Va. Code §2.1-37.13, are much more than "minor matters of public inconvenience or annoyance." They are matters involving a serious and substantive evil—the imminent and substantial threat to the orderly administration of justice posed by the premature disclosure of the confidential proceedings of the Judicial Inquiry and Review Commission. And they are matters upon which courtroom evidence is unnecessary to sustain their truth and validity.

History tells us that the methods of dealing with disabled or unfit judges by legislative impeachment[8] or removal,[9] existing prior to creation of the Commission, were seldom used and generally unsatisfactory. The inadequacies of those methods prompted inquiry into other means of handling problem judges. Led by California, numerous jurisdictions have created commissions or other bodies to investigate complaints against judges. Along with Virginia, many of the jurisdictions have imposed requirements of confidentiality in commission proceedings. Note 6, *supra*.

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[8] Section 54 of the Constitution of 1902 (Article IV, Section 17 of the Constitution of 1971).

[9] Section 104 of the Constitution of 1902 (omitted from the new constitution).

The necessity for confidentiality of commission proceedings is self-evident from this statement:

> "Proceedings before the Commission must be confidential. The initial job of the Commission will be to ascertain which complaints have sufficient merit to deserve serious attention. Obviously there is the risk that a disappointed litigant may seek to vent his wrath upon the judge by filing a complaint with the Review Commission, or that complaints will be filed upon other vexatious and frivolous grounds. Such complaints must be weeded out—hence the requirement of confidentiality of Commission proceedings." A. Howard, *Commentaries on the Constitution of Virginia* 764 (1974).

The California experience furnishes support for the confidentiality of commission proceedings:

> "A prime feature of the Commission plan for judicial discipline is that, unlike the impeachment, recall, and election processes, the charges, and investigation thereof, are not made public until and unless a recommendation for censure, removal or retirement is made to the Supreme Court. The proceedings are entirely confidential up to that point. This gives the individual judge and thereby the judiciary reputation protection until a full scale investigation has been made and a competent body of peers has made an adverse decision on the merits of the charge. The shield of confidentiality also preserves reputations while the corrective influence of the Commission is being exerted on a judge who would otherwise be reluctant to change

his behavior lest the public view this as an admission of prior misconduct . . . . Thus, reputations are preserved while allowing ample opportunity for complete investigation and voluntary corrective action." Buckley, *The Commission on Judicial Qualifications: An Attempt to Deal With Judicial Misconduct*, 3 U.S.F.L. Rev. 244, 255-56 (1968-1969).

Florida requires confidentiality of proceedings before its Judicial Qualifications Commission, the counterpart of our Judicial Inquiry and Review Commission. In discussing the Commission, the Florida Supreme Court has stated:

"The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges . . . . Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system." *Forbes* v. *Earle*, 298 So.2d 1, 4 (Fla. 1974).

Thus, the requirement of confidentiality in Commission proceedings (1) protects the reputation of an individual judge by shielding him from publicity involving frivolous complaints, (2) protects public confidence in the judicial system by preventing disclosure of a complaint against a judge until the Commission has determined the charge is well-founded, and (3) protects complainants and witnesses

from possible recrimination by prohibiting disclosure of their identity prior to a determination that the complaint is meritorious.

Considering those matters, we believe it can be said safely, without need of hard in-court evidence, that, absent a requirement of confidentiality, the Judicial Inquiry and Review Commission could not function properly or discharge effectively its intended purpose. Thus, sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings—the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice.

The ultimate and real concern in this type of case is exemplified by a statement in *Pennekamp* v. *Florida:*

"[R]eviewing courts are brought in cases of this type to appraise the [press] comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes." 328 U.S. at 336.

We recognize the public interest in information pertaining to judicial discipline and in free debate upon the conduct of the judiciary. *See Wood* v. *Georgia*, 370 U.S. at 392. We find, however, that the statute in question places the least possible restraint upon this public interest while, at the same time, it assures effective functioning of the Commission. When a complaint is filed with this court, the entire record of the Commission's proceedings becomes public. And, as we have noted previously, the statute does

not curtail general comment or criticism concerning a judge or the conduct of his judicial affairs.

On balance, therefore, we find that the necessity of maintaining the integrity of the Judicial Inquiry and Review Commission as an essential component in the administration of justice clearly outweighs any possible advantage of public disclosure of the Commission's proceedings prior to the filing of a complaint with this court. Accordingly, we affirm the judgment of the trial court.

Affirmed.

Poff, J., dissenting.

I dissent. The judgment should be reversed and final judgment should be entered for the defendant. In my view, the statute should be construed not to apply to this defendant under these circumstances. Construed otherwise, the statute offends the First Amendment.

As the parties agree and the majority recognize, there is utterly no evidence of record showing a "clear and present danger". The majority simply conclude that the General Assembly concluded that there was a danger so clear and present as to justify a statutory abridgment of the right to publish. The majority reach their conclusion unaided by legislative history and without benefit of a declaration of such danger in the statute or the Constitution which mandates the statute. Just as a court cannot infer the existence of a clear and present danger from allegations made in a contempt citation and adopt that inference as a conclusion of law, *Wood* v. *Georgia*, 370 U.S. 375 (1962), a court cannot infer the existence of a clear

and present danger from the mere enactment of a penal statute.

If a restriction upon publication of lawfully-acquired information concerning the proceedings of a commission reviewing charges against a judicial officer can be constitutionally justified by a simple conclusion that publication poses a clear and present danger to the administration of justice, a similar conclusion could justify a similar restriction with reference to the proceedings of a commission reviewing charges against an executive officer or a legislator.

I simply believe that, in order to justify a statutory exception to the constitutional guarantee, there must be an *evidentiary* showing of a clear and present danger to a legitimate governmental interest, and an evidentiary showing that the statutory sanction is the minimum necessary to meet that danger and protect that interest. The legal presumption is in favor of the First Amendment and against the exception, and legal presumptions survive until rebutted by evidence.